BENNY CHENG JOO SAN

v.

GUTTAS & RESIN SDN. BHD.

HIGH COURT MALAYA, KUANTAN
VC GEORGE J
[CIVIL APPEAL NO. 11 OF 1976]
11 MARCH 1983

LANDLORD AND TENANT: *Warrant of distress - Application to set aside - Whether distress leviable - Whether in fact levied against premises - Presumptions.*

The appeal was from the decision of the President of the Sessions Court dismissing an application to set aside a warrant of distress and for the return of the premises No. 80C & D, Jalan Telok Sisek, Kuantan, possession of which had been taken by the bailiff of the Court pursuant to s. 23 of the Distress Ordinance.

Held:

[1] There was no evidence to support the submissions that distress was not levied against premises No. 80D, Jalan Telok Sisek, Kuantan or that the premises were being used as a tyre-retreading shop by a relative of the appellant at the time of the execution of the distress warrant, or that the premises were part of a building unit the annual value of which was RM4,320.

[2] There was nothing to stop the landlord from resorting to distress proceedings in the face of the contention that the premises were rent-controlled.

[3] Though the President was wrong in not directing his mind to the issue as to whether the premises were rent-controlled, he took that attitude on the basis of the statement of the appellant in his affidavit regarding the issue, which statement was hearsay and inadequate.

[4] As the appeal was a re-trial, the appellate Court could consider the above issue though it had not been considered in the Court below.

[5] On a balance of probabilities on the evidence before the President, if he had directed his mind to the issue he would have had to conclude that the building was erected in the early fifties. The burden of proving whether the premises are controlled or not is on the landlord. (*Yong Chiang v. Bong Tjhin Oi* [1973] 2 MLJ 136).

[6] Since the bailiff had in fact taken possession of the premises the presumption was that he had found the premises abandoned and the presumption had not been rebutted. There is a rebuttable presumption under s. 114(c) Evidence Act that judicial official acts have regularly been performed. The circumstances of the case raised yet another presumption pursuant to s. 114(g).

[7] The fact that the tenancy was subsisting when distress was resorted did not invalid the proceedings. The general rule is that the tenancy should subsist when distress is resorted to. s. 5(3) of the Distress Ordinance provides an exception to the general rule.

[8] The President might have been misled as to whether the premises were controlled or not but the matter was irrelevant because he would in fact have decided that the premises were not controlled if he had directed his mind to the issue.

[Appeal dismissed.]

Case referred to:
Yong Chiang v. Bong Tjhin Oi [1973] 2 MLJ 136

Legislation referred to:
Distress Ordinance, ss. 5(3), 23
Evidence Act 1950, s. 114 illus(e), illus(g)

For the appellant - Mahindar Singh; M/s. Mahindar Singh & Co.
For the respondent - Shah Balendran; M/s. Balendran Chong & Bodi

JUDGMENT

VC George J:

This is an appeal from the decision of the learned President of the Sessions Court dismissing an application for setting aside a warrant of distress and for the return of the premises No. 80C & D, Jalan Telok Sisek, Kuantan, Pahang possession of which had been taken by the Bailiff of the Court pursuant to s. 23 of the Distress Ordinance.

Counsel on behalf of each of the parties tendered a written submission. I approach this appeal by dealing with the points raised by Counsel on behalf of appellant in his written submission.

After setting out the various steps that had been taken from the time that the respondent had made his application for distress it was submitted that distress was not levied against premises No. 80D, Jalan Telok Sisek, Kuantan. This submission is inconsistent with the documents in the Appeal Record. The application was in respect of premises No. 80C & D, the Warrant of Distress was in respect of 80C & D, and the Notice to the appellant clearly refers to premises 80C & D.

It was next submitted that the premises at the time of the execution of the Distress Warrant, was used as a tyre-retreading shop by a relative of the appellant.

Now, the only evidence before the Court were the two affidavits by Wong Yee Thye, Managing Director of the respondent company and the affidavit of Benny Cheng Joo San the appellant. There is nothing in any of the affidavits to support the submission that the premises was used as a tyre retreading shop by a relative of the appellant.

The next point made in submission was that the premises was part of a building unit known as No. 80, Jalan Telok Sisek, Kuantan and that the annual value of the building as at 1 September 1970 was Dollars Four Thousand Three Hundred and Twenty (RM4,320). This submission was based on para. 15 of the said affidavit of the appellant. The deponent does not say where he got the information on which he based his assertion. It is a bald statement denied by the respondent in para. 11 of the Affidavit-In-Reply.

The next point worth considering is the submission that the respondent was wrong in availing himself of the Distress Ordinance on the facts of the case. The contention appears to be that since a dispute had arisen as can be seen from the exchange of letters between parties as to whether the premises were rent-controlled or not, until that issue was settled the respondent was not entitled to distrain for the alleged arrears of rent. In my judgment there was nothing to stop the landlord from resorting to Distress Proceedings in the face of contention that the premises were rent-controlled but in doing so the landlord exposed himself to the risk of having the issue of whether the premises were rent-controlled or not, tried in the application to set aside the *ex-parte* Order made by the Court. At the trial, if the Court found that rent was not lawfully due, the order made would have been set aside.

I agree with learned Counsel for the appellant that the learned President was wrong in not directing his mind to this issue. But it could very well be that the learned President took that attitude because of the basis of the appellant's contention which is para. 11 of his affidavit:

> I have made enquiries among older residents of Kuantan and also to the best of my personal knowledge having worked at the premises when it was occupied by the Chartered Bank I verily believe and say that the premises was subject to control of Rent Control Act, 1966 pursuant to s. 4(2)(a) thereof in that the said buildings were completed prior to 31 January 1948.

The first part of this statement is inadmissible as being hearsay of the worst kind - information from unnamed persons. The second part does not carry the matter any further since the Court was not appraised of the period that the premises were occupied by the Chartered Bank.

This Appeal being a retrial, it is open to me to direct my mind to issues that had not been considered by the Court below. The burden of proving whether the premises are controlled or not is on the landlord (See *Yong Chiang v. Bong Tjhin Oi* [1973] 2 MLJ 136). In his affidavit-in-reply Mr. Wong Yee Thye, in para. 10, states as a matter of personal knowledge that the building was erected in 1954 by the late Mr. C.J. Windsor, that Mr. Wong's father was the contractor who built the premises and the architect was Mr. Wong's brother. Mr. Wong also produced what was alleged to be the plans of the building which was marked as Exhibit WYT2. The availability of the plans gives some credence to the Wong family's involvement in the erection of the building. There is the date 6 June 1954 affixed to the plan which *per se* does not necessarily show that the building was erected at or about that date. However, on balance of probabilities on the sparce evidence before the learned President, if he had directed his mind to the issue he would have had to conclude that the building was erected in the early fifties. I find that as a fact.

The next point taken in the written submission of the appellant was on the issue as to whether the premises were deserted when the Bailiff took possession of it. It was again submitted that no Distress Warrant was levied against 80-D, Jalan Telok Sisek, Kuantan which as I pointed out earlier, is inconsistent with the Court documents. It was again submitted that the premises were being used as a tyre shop. As I have said there was no evidence to this effect. It was further argued that since certain articles were seized in premises No. 80C the fact that these articles were there demonstrates that the premises were never deserted. I find no merit in the submission. Just as a person could abandon premises he could abandon the furniture therein. All that was recovered by the public auction of the movables found in the premises was a mere RM236 which is not consistent with the contention that the premises and the articles therein had been abandoned. I might add that what was found in the premises in quite inconsistent with Counsel's repeated submission that the premises were being used as a tyre shop by an unnamed relative of the appellant. It is indeed a strange kind of tyre shop with not a single tyre in.

There is a presumption that judicial official acts have regularly been performed. (Evidence Act s. 114 illus(e). Since the Bailiff did take possession of the premises the presumption is that he found the premises abandoned. This is of course a rebuttable presumption. The rather nebulous assertion that the premises were being used by an unnamed relative of the appellant (an assertion not made by the appellant but by Counsel from the Bar!) cannot by any stretch of the imagination be said to have rebutted the presumption. The fact that the appellant did not himself say so and the fact that the relative who was said to be in

occupation was not forthcoming raises yet another presumption pursuant to s. 114(g) of the Evidence Act. In any event, evidence from the Bar table is not admissible and the practice of slipping in what is "evidence" in Counsel's submission is a practice that does not do that Counsel's client an iota of good. Not only is such a practice improper it is also poor advocacy.

The next point being taken in the submission is that the respondent had not determined the tenancy prior to taking out a Distress Application. It was submitted:

> It is clear that s. 5(3) of the Distress Ordinance that arrears of rent may be distrained for after the determination of the tenancy. Thus it is my humble submission that the whole of the Distress Proceedings are void and wrong in law.

Counsel has obviously read the sub-section out of context. It has to be read together with the rest of the sub-section when it would be clear that the effect of sub-section (3) is that even if there was a determination of the tenancy in certain circumstances the landlord may distrain. The general rule is that the tenancy should subsist when distress is resorted to. Sub-section (3) provides an exception to the general rule.

The next point taken was that the learned President was misled by the respondent's solicitor's submission that the appellant's remedy was under the Rent Control Act and the Rent Tribunal. If that was the reason why the learned President ignored the issue of whether the premises were controlled or not then he was wrong. But the matter is only of academic interest because as I said earlier, on the evidence before him even if he had directed his mind to the issue his judgment would have been that, on a balance of probabilities, the premises in fact were not controlled. The appeal is dismissed with costs.

Also found at [1983] 2 CLJ 134